1	IN THE SUPREME COURT OF THE UNITED STATES	
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3	PHILIP MORRIS USA,	:
4	Petitioner,	:
5	V.	: No. 05-1256
6	MAYOLA WILLIAMS.	:
7		x
8	Wash	ington, D.C.
9	Tues	day, October 31, 2006
10		
11	The above-entitled matte	er came on for oral
12	argument before the Supreme C	court of the United
13	States at 10:03 a.m.	
14	APPEARANCES:	
15	ANDREW L. FREY, ESQ., New Yor	k, N. Y.; on behalf of
16	the Petitioner.	
17	ROBERT S. PECK, ESQ., Washing	ton, D.C.; on behalf of
18	the Respondent.	
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1	PROCEEDINGS
2	(10:03 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear argument
4	first this morning in Philip Morris vs. Williams.
5	Mr. Frey?
6	ORAL ARGUMENT OF ANDREW L. FREY
7	ON BEHALF OF THE PETITIONER
8	MR. FREY: Mr. Chief Justice, and may it
9	please the Court: This case is here following this
10	Court's remand to the Oregon courts to reconsider their
11	decision in light of State Farm, a task at which we
12	submit the Oregon courts completely failed. It presents
13	two independent but thematically interrelated issues,
14	both of which implicate what the Court said in State
15	Farm, which is that, and I quote, courts must ensure
16	that the measure of punishment is both reasonable and
17	proportionate to the amount of harm to the plaintiff and
18	to the general damages recovered.
19	Now significantly, respondent defends
20	neither oh, I should stop for a minute and describe
21	the issues. So the first issue is whether the Oregon
22	Supreme Court properly held that Philip Morris was
23	correctly denied an instruction which would have told
24	the jury that it was not to punish for harm to
25	nonparties. The Oregon Supreme Court held that that

- 1 instruction was legally incorrect, it was proper for the
- 2 jury to punish for harm to nonparties, and therefore the
- 3 instruction was correctly denied.
- 4 JUSTICE GINSBURG: Mr. Frey, are you talking
- 5 about what is numbered, is it number 34?
- 6 MR. FREY: Yes.
- JUSTICE GINSBURG: That's the --
- 8 MR. FREY: Yes. The key paragraph from
- 9 number 34 which is set forth at page 4 of our brief, as
- 10 well as numerous other places in the materials. It
- 11 says, the size of any punishment should bear reasonable
- 12 relationship to the harm caused to Jesse Williams by the
- 13 defendant's punishable misconduct. Although you may
- 14 consider the extent of harm suffered by others in
- 15 determining what that reasonable relationship is, you're
- 16 not to punish the defendant for the impact of its
- 17 alleged misconduct of other persons who may bring
- 18 lawsuits of their own, etc.
- 19 JUSTICE GINSBURG: You don't think that
- 20 would confuse the jury if they are first told that they
- 21 may consider the extent of harm suffered by others, and
- then the next instruction seems to say they can't?
- MR. FREY: I don't. First of all, I don't
- 24 think that's what it says, and I don't think it would
- 25 confuse the jury, and I'm confident that with that

- 1 instruction, counsel could explain it. But let me stop
- 2 there, because I know this was something that Justice
- 3 Scalia expressed some uncertainty about in the State
- 4 Farm argument, and that the Oregon Supreme Court said
- 5 they didn't clearly understand.
- To consider the conduct means to evaluate it
- 7 in connection with assessing the blameworthiness of the
- 8 conduct being punished.
- 9 JUSTICE SOUTER: Isn't that the problem? If
- 10 the instruction had said that, you would have a very
- 11 different instruction, and I'm bothered by the
- instruction too for just that reason. It says you may
- 13 consider, and if I were a juror parsing the instruction,
- 14 I would say why. You've just told me I'm not supposed
- 15 to punish them.
- 16 MR. FREY: Well, the second part of it is,
- 17 what punishment means is what would be done in a class
- 18 action, for instance, to impose punishment for all the
- 19 harm suffered by Oregon smokers.
- JUSTICE SOUTER: Okay. This is an argument
- 21 that you're making to us, but I don't know how a juror
- 22 is supposed to figure this out.
- MR. FREY: Well, let me say a couple of
- 24 things about that. First of all, the Oregon Supreme
- 25 Court did not rely on this aspect. It held that it was

- 1 proper to punish for harm to nonparties. Now this, in
- 2 our view, this instruction, and there's always a danger
- 3 when you add words to an instruction that you will add
- 4 something that a court will find was incorrect and
- 5 therefore deny the instruction, even though the essence
- 6 of it was correct.
- 7 JUSTICE GINSBURG: Where did the Oregon
- 8 Supreme Court say it was proper to punish the harm to
- 9 nonparties? Your brief quotes something to that effect,
- 10 but -- the sentence is on page 18(a) of the appendix to
- 11 the petition. It says, what the Oregon court said is,
- 12 Philip Morris asserts that Campbell prohibits the state
- 13 acting through a civil jury from using punitive damages
- 14 to punish a defendant for harm to nonparties. The
- 15 Oregon Supreme Court on its own, I think, didn't put it
- 16 in terms of harming particular nonparties, but to
- 17 exposing Oregon residents to the risk of a deadly
- 18 disease.
- 19 MR. FREY: Well, I would refer the Court to
- 20 pages 20(a) to 21(a) of the appendix, where the court
- 21 discusses, comes to its conclusion on this point. And
- 22 it says, the instruction would prohibit the jury from
- 23 punishing the defendant for the impact of its alleged
- 24 conduct on other persons even if those persons were
- 25 Oregonians who were harmed. But on 28(a) it says,

- 1 because the proposed verdict did not accurately reflect
- 2 the law, this is not a statement about Philip Morris's
- 3 position, the trial court did not commit reversible
- 4 error when it refused to give it. So I think the court
- 5 was quite clear in saying -- let me complete my answer,
- 6 because I think considering it moves the needle along
- 7 the scale of allowable punishment for the harm to Jesse
- 8 Williams, but it does not abandon the principle of
- 9 proportionality to that harm, whereas punishing for it
- 10 is what you would do in a class action. You would
- 11 punish for all the harms to all the Oregonians. This is
- 12 a one-way class action in which Philip Morris was
- 13 exposed to global punishment by the jury without any of
- 14 the protections of a class action. So --
- JUSTICE SOUTER: Let me -- let me -- let me
- 16 focus on the problem that I have right now this way. If
- 17 I look at the Oregon Supreme Court opinion, and
- 18 particularly at the point that you mention in 20 and 21,
- 19 I have to say I, I read the opinion the way you read the
- 20 opinion. I read them the same, just what you claimed
- 21 they were saying. The difficulty that I have is because
- 22 I think the instruction that was proposed on behalf of
- 23 your client was not a clear instruction, I have great
- 24 difficulty in seeing how I could find that it was error
- 25 to refuse to give the instruction.

Τ	MR. FREY: Well
2	JUSTICE SOUTER: So my problem is, if I
3	think they really did have the wrong view of the law but
4	the issue was focused at the trial court by a request
5	for an instruction which I think was properly denied,
6	what do I do? Do I concentrate on what they said in the
7	opinion or do I concentrate on what I think was the
8	deficiency of the instruction?
9	MR. FREY: Well, I think what you do is
10	decide the Federal issue, which I think is whether they
11	were correct in the legal proposition that they
12	asserted.
13	JUSTICE SOUTER: But then they would
14	respond, when they made that, when they gave that
15	explanation in the Oregon Supreme Court, they were
16	responding to a claim of error which was focused and
17	raised at the trial level by the request for an
18	instruction, which strikes me as probably an unsound
19	instruction, an unsound request.
20	JUSTICE SCALIA: Well, I guess we could
21	leave it up to them whether they want to disallow the
22	instruction for a different reason, but the fact is they
23	disallowed it for the reason that you say.
24	MR. FREY: That's correct.
25	JUSTICE SCALIA: And we can say that was

- 1 error and remand it to them. That might not make
- 2 anybody happy, but it would be up to them whether or not
- 3 --
- 4 MR. FREY: That's correct.
- 5 JUSTICE SOUTER: In effect, it would give
- 6 you another chance in Oregon.
- 7 MR. FREY: But I do want to question the
- 8 premise. First of all, the instruction says basically
- 9 what this Court said in BMW, which is where it drew
- 10 precisely that distinction.
- 11 JUSTICE SOUTER: It's a good thing we
- 12 weren't instructing that jury.
- MR. FREY: Well, I don't think there is --
- 14 the concept may be abstract, the difference between
- 15 considering and punishing, but it's quite clear in this
- 16 Court's jurisprudence and I think it can be made quite
- 17 clear to the jury with the benefit of the proper
- 18 instruction, and I don't -- I don't have any --
- 19 JUSTICE SOUTER: Oh, I do too. I don't have
- 20 any trouble with the distinction.
- 21 MR. FREY: If we had this instruction, if we
- 22 had this instruction which I believe is correct, there
- 23 is nothing incorrect about this instruction. It is
- 24 correct that the jury may consider. We are not
- 25 challenging that the jury may consider the conduct and

- 1 may determine that the conduct --
- 2 JUSTICE SOUTER: Well, first answer the
- 3 question, if the juror would speak up. It doesn't
- 4 answer the question. Consider for what? How? Why am I
- 5 supposed to be considering it when you've just told me
- 6 not to punish?
- 7 MR. FREY: Well, I think the instruction
- 8 said --
- 9 JUSTICE SOUTER: Or not punish for other --
- 10 MR. FREY: I think the instruction says that
- 11 you are supposed to consider it in connection with
- 12 determining the reprehensibility of the conduct.
- JUSTICE SCALIA: No. If it said that, I
- 14 would have no trouble with it. What it says is, you may
- 15 consider it in determining what the reasonable
- 16 relationship is between the harm caused to Jesse
- 17 Williams and the amount of punitive damages assessed. I
- don't see how injury to others can have any bearing upon
- 19 whether the punitive damages bear a reasonable
- 20 relationship to Jesse Williams' harm. That's my problem
- 21 with it.
- MR. FREY: Well, they do, because conduct
- 23 that is more blameworthy, in terms of determining, as
- 24 this court has said in all its cases, and I know you
- 25 don't agree with the whole inquiry --

Τ	JUSTICE SCALIA: I don't.
2	MR. FREY: But as this Court has made quite
3	clear, the reprehensibility of the conduct is an
4	important factor in determining where along the scale of
5	reasonable relationships in a particular case you might,
6	the relationship might be reasonable. So, more conduct
7	that is calculated to harm large numbers of people can
8	be found more blameworthy as to warrant a higher
9	proportion, a higher relationship between the punitive
10	and compensatory damages.
11	CHIEF JUSTICE ROBERTS: And when you do
12	that, counsel, aren't you punishing the defendant for
13	the harm to others? You're going to award a higher
14	multiple to respond to the damages
15	MR. FREY: No.
16	CHIEF JUSTICE ROBERTS: based on the
17	conduct to others. Why wouldn't a normal juror think
18	MR. FREY: I think you are
19	CHIEF JUSTICE ROBERTS: Excuse me. Why
20	wouldn't a normal juror view that as punishing for the
21	harm to others?
22	MR. FREY: Well, I think that the semantical
23	quibbling is not something that the jury would have
24	difficulty with, in my opinion. But let me try to
25	explain the difference this way. If you're considering

- 1 it in relation to determining the proper punishment for
- 2 the harm to Jesse Williams, you should come up with a
- 3 number that can be properly replicated in case after
- 4 case if other juries arrived at the same conclusion
- 5 about the conduct. If you are punishing for the
- 6 conduct, you should come up with a number that precludes
- 7 further punishment for the same, punishing for the harm,
- 8 further punishment for the same harm, for the same
- 9 causes of action for punitive damages that various
- 10 Oregonians had. So there's a fundamental difference in
- 11 that respect between considering and punishing for it,
- 12 and the Court has said repeatedly, and I don't think
- 13 they can contest this, that the character of the conduct
- 14 can be considered in determining the proper level or
- 15 allowable level of punitive damages, that improving the
- 16 character of the conduct is the intended scope of the
- 17 harm, if it's an isolated incident, if it's a consistent
- 18 pattern of misconduct.
- 19 So, I don't think it is proper to tell the
- 20 jury that they may not consider the conduct without
- 21 getting ourselves in serious trouble. So -- and I
- 22 don't, I don't think, and the difference is potentially
- 23 enormous. If you think about a jury that was deciding a
- 24 punitive damages class action and a jury that was told
- 25 that they had to punish for the harm to the particular

- 1 plaintiff in the, in the particular case, it's, it's
- 2 obvious that the results would be vastly different in
- 3 those cases. And the problem we were worried about was
- 4 that the jury would think of itself as the punishment
- 5 agency to impose statewide punishment for the harms to
- 6 all Oregon smokers who were deceived by Philip Morris --
- JUSTICE STEVENS: But, Mr. Frey, let me
- 8 ask you a question. Suppose this was a criminal case
- 9 and the defendant was being punished for crime A and the
- 10 judge in working out the sentence realizes he also
- 11 committed crimes B, C, D, and E. He could take those
- 12 into account in determining the extent of the sentence
- 13 given for crime A. Why isn't that similar?
- MR. FREY: It is similar, but what he can't
- do is punish for crimes B, C, D, and E. Suppose we had
- 16 a mail fraud prosecution --
- 17 JUSTICE STEVENS: And if there was a second
- 18 -- the same defendant got convicted again for crime X.
- 19 At that sentencing the judge could again take into
- 20 account the harm to defendants B, C, and D.
- 21 MR. FREY: That's true. That's certainly
- 22 true. That's why our point is that it's one thing to
- 23 produce a punishment that can properly be replicated in
- 24 case after case without producing an excessive total
- 25 punishment. It's another thing to punish in case after

- 1 case for the same harms.
- 2 JUSTICE STEVENS: That's not the same harm
- 3 if it's a different defendant or a different plaintiff
- 4 in the second case. You're punishing him for the harm
- 5 to be this time, and you can -- just as in a criminal
- 6 case, why can't you in both cases take into account
- 7 that, the harm to the class, to the public at large?
- 8 MR. FREY: If this was a mail fraud
- 9 prosecution for defrauding Jesse Williams into buying
- 10 cigarettes and the punishment was five years for that,
- 11 the judge could consider in setting the punishment
- 12 between zero and five the fact that this was part of a
- 13 scheme that was intended to or may have deceived large
- 14 numbers of other people in setting the punishment
- 15 between zero and five. What the judge cannot do and
- 16 what we were worried the jury would do here and what we
- 17 think the size of its verdict may suggest it actually
- 18 did here is to think that they could punish it by not
- 19 just 5 years, but 10 or 15 or 20 for all of the other
- 20 persons, for all the other wrongs that they find to have
- 21 been done.
- JUSTICE KENNEDY: In that respect, how does
- 23 the -- there may not be a definitive authority by this.
- 24 But Oregon says that if the corporation commits
- 25 manslaughter it's required to pay up to twice the amount

- 1 corporation gained by committing the offense --
- 2 MR. FREY: Yes.
- JUSTICE KENNEDY: -- is my understanding.
- 4 Suppose a corporation in a hypothetical case commits
- 5 five manslaughters. Would they be liable -- and gained
- 6 \$1 million. Would they be liable for twice a million
- 7 dollars in every manslaughter case?
- 8 MR. FREY: No. But I think the disgorgement
- 9 argument that has been made by the other side suffers
- 10 from exactly the same problem as the global punishment
- 11 problem. That is, you can't -- if you disgorged in
- 12 every case all the profits that were earned from selling
- 13 cigarettes to Oregonians and to Oregonians became
- 14 sick --
- 15 JUSTICE GINSBURG: But we don't know,
- 16 Mr. Frey, what Oregon law is on that point. They do
- 17 have a law that the Oregon court thought meant that they
- 18 must adjust in the next case. And how would you deal --
- 19 would it be different if Oregon, as many states, said
- 20 part of that punitive award goes not to the plaintiff,
- 21 but to some state fund?
- MR. FREY: I don't, I don't think that --
- 23 our complaint is not that the plaintiff is getting the
- 24 money. Our complaint is with how much we're being
- 25 punished and what the procedural regime is that has led

- 1 to punishing us.
- 2 JUSTICE GINSBURG: But if the law in Oregon
- 3 were, plaintiff number two, you don't get punitive
- 4 damages or you can get only the difference between what
- 5 the jury awarded you and what Philip Morris has already
- 6 paid out in punitive damages?
- 7 MR. FREY: Well, first of all, that's not
- 8 the law in Oregon.
- 9 JUSTICE GINSBURG: We don't know what it is.
- 10 We haven't had the second case.
- 11 MR. FREY: Well, we have no -- well, the
- 12 Oregon Supreme Court did not rely on this, on this
- 13 statute, for purposes of dealing with the harm to
- 14 others, harm to nonparties problem. The statute does
- 15 not require giving credit, only consideration. Even if
- 16 it, even if it did, it operates as a one-way ratchet.
- 17 That is, you keep making awards until you've reached the
- 18 maximum that would be allowable for all the conduct even
- 19 though juries, properly instructed, might have awarded
- 20 substantially less and even though many juries might
- 21 exonerate the defendant totally, as many juries have in
- 22 tobacco cases. So the Oregon regime is, is a formula
- 23 for having what amounts to excessive punishment or at
- 24 least unfair punishment.
- 25 And finally, the, the 30.925, which was

- 1 referred to by the court of appeals, requires submitting
- 2 this evidence to the jury and, as the trial court said
- 3 in this case at page 195A of the joint appendix, there
- 4 is no telling whether submitting the prior awards to the
- 5 jury would produce higher or lower awards in this case.
- 6 So I think it's an entirely illusory protection to rely
- 7 on that.
- 8 JUSTICE BREYER: Can I ask you -- are you
- 9 finished?
- 10 MR. FREY: Yes. I was going to say that
- 11 because our concern is structural with the design of the
- 12 Oregon system as it's been approved by the Oregon
- 13 Supreme Court, I don't think this inadequate remedy can
- 14 save that system.
- 15 JUSTICE BREYER: I wanted to know what you
- 16 think about a suggestion that I got from something that
- 17 Justice Scalia said. I don't know whether he was making
- 18 it or not, but I'll make the suggestion and see what you
- 19 think. Suppose that this case -- suppose we were to
- 20 say, there are many issues in this case, some of them
- 21 very difficult, but one thing we're certain about: You
- 22 cannot in a trial consistent with the due process clause
- 23 in a trial of plaintiff versus defendant take money from
- 24 the Defendant and give it to the plaintiff for the
- 25 purpose of punishing the Defendant for something he did

- 1 to a different person who wasn't there. Now -- so he
- 2 couldn't defend against him. That person didn't present
- 3 a claim. So we are certain of that.
- Now, we're not certain whether that's what
- 5 happened here. It may have done. There is certainly a
- 6 lot of language to suggest it, and there is some
- 7 language the other way. So we remand it to the court
- 8 with that instruction that they cannot permit this to
- 9 have happened if it happened. Whether it happened and
- 10 what happened is a matter of Oregon law in large part
- 11 and things about instructions, etc. Now, what's your
- 12 view of that kind of disposition?
- 13 MR. FREY: Well, I think the first part of
- 14 your premise is clearly correct and totally consistent
- 15 with the position we are taking. Whether it happened
- 16 here or not is an interesting question. It is in the
- 17 nature of a limiting instruction, which was basically
- 18 what this was. You can use the evidence for one
- 19 purpose, legitimate purpose, but don't use it for an
- 20 illegitimate purpose. But we can't tell ordinarily,
- 21 because jury deliberations are secret and we can't tell
- 22 what they have decided, we can't tell whether they have
- 23 imposed global punishment or not.
- But we anticipated the problem. We proposed
- 25 an instruction which would as best we could at the time

- 1 address the problem. Maybe it could be edited up to be
- 2 a little sharper. But I think it contains the essential
- 3 point that we're driving at here today.
- 4 JUSTICE BREYER: Maybe, but it's possible
- 5 the Oregon court would say: Well, no instructions are
- 6 perfect, but -- and no set of jury instructions is
- 7 perfect. But if we look at the jury instructions
- 8 without the suggested one that was rejected and then we
- 9 look at the suggested one, we find the suggested one had
- 10 many things wrong with it, not just, you know, problems,
- 11 confusion, et cetera. We find the instructions weren't
- 12 perfect but, given Oregon evidentiary law, we think the
- 13 trial judge made reasonable decisions, therefore okay.
- MR. FREY: You're raising a question whether
- 15 that would be an adequate --
- 16 JUSTICE BREYER: I don't know. That's what
- 17 worrying me, what's worrying me about this is I see as
- 18 we try to determine what this instruction said, whether
- 19 it was good enough, whether the instructions without it
- 20 are good enough, that we're going to be in a kind of bog
- 21 of mixtures of constitutional law, unclear Oregon state
- 22 law, not certain exactly what was meant by whom in the
- 23 context of the trial, et cetera.
- MR. FREY: Well, I think this is a pretty
- 25 fundamental principle. I believe the instruction fairly

- 1 captured it. I don't think there would be an adequate
- 2 and independent state ground for refusing the
- 3 instruction. Keep in mind that in State Farm the Court
- 4 said the defendant upon request would have been entitled
- 5 to an instruction on the subject of extraterritorial
- 6 punishment. Now, this is conceptually not really
- 7 different from extraterritorial punishment. We wouldn't
- 8 --
- 9 CHIEF JUSTICE ROBERTS: Mr. Frey, I suppose
- 10 your theory here depends on the nature of the underlying
- 11 tort, I suppose, in that there are, you argue, defenses
- 12 that may be available with respect to other, other
- 13 individuals who are harmed.
- MR. FREY: Certainly.
- 15 CHIEF JUSTICE ROBERTS: So this argument
- 16 wouldn't apply in a case if the underlying tort weren't
- 17 susceptible to those sorts of defenses.
- 18 MR. FREY: It would still apply because
- 19 different factfinders, different juries, might reach
- 20 different conclusions on the same evidence, assuming
- 21 that a summary judgment for the plaintiff is not proper.
- 22 What you're doing is preempting, you're allowing a
- 23 potentially aberrational verdict, which there could be
- 24 in many cases, to preempt the work of other juries. The
- 25 whole essence of the idea that we were trying to convey

- 1 here and the legal principle that we are arguing today
- 2 is to confine the jury to its proper domain and its
- 3 domain is the case before it.
- 4 JUSTICE SCALIA: The jury can't really find
- 5 that other people were harmed. The jury doesn't have
- 6 evidence before it except as to this person. The most
- 7 the jury can find, it seems to me, is that the, the
- 8 activity engaged in bore a very serious risk of harming
- 9 other people. I think a jury could find that. And
- 10 therefore, the activity is more heinous and should be
- 11 punished more severely. But I -- you don't --
- 12 MR. FREY: Accepting the premise, accepting
- 13 the premise, we don't disagree with your conclusion.
- 14 That is, if the jury could find that they could punish
- 15 this more severely. What they cannot do is punish it
- 16 globally.
- JUSTICE SCALIA: Yes, but I don't think I'm
- 18 quibbling, but you seem to be conceding that this jury
- 19 can decide that other people have been harmed and take
- 20 into account the harm that it found other people
- 21 suffered in deciding the penalty. And I don't think
- 22 this jury has any basis for finding that other people
- 23 were harmed. It could say there was a serious risk of
- 24 it.
- 25 MR. FREY: It can certainly consider the

- 1 scope of the intended scheme. The fact that it didn't
- 2 have evidence didn't stop the Oregon Court of Appeals
- 3 from finding and the Oregon Supreme Court from endorsing
- 4 the finding that many Oregonians were deceived, even
- 5 though --
- 6 JUSTICE STEVENS: Isn't there a distinction
- 7 between actual harm to others and the risk of harm?
- 8 Supposing the defendant fired a machine gun into a crowd
- 9 of people.
- 10 MR. FREY: Right.
- 11 JUSTICE STEVENS: And he killed one, at
- 12 least one. And then one sued and said: I want extra,
- 13 punitive damages because all these other people were
- 14 subjected to the same risk. Wouldn't that be a proper
- 15 consideration?
- 16 MR. FREY: I think it is. I think in TXO
- 17 the court --
- 18 JUSTICE STEVENS: Would it be a proper
- 19 consideration even if a second person brought the same
- 20 action?
- MR. FREY: Well, if there were more, if
- there were other people that had causes of action, then
- 23 I think there is a problem. In your hypothesis if only
- 24 one person was injured --
- JUSTICE STEVENS: But you're not asking to

- 1 recover for the actual harm to the others. You're
- 2 saying there was a general risk of harm to many, many
- 3 people, which is similar to what we have here. We don't
- 4 know whether they're harmed or not, but that can be
- 5 taken into account in fixing the ultimate verdict.
- 6 MR. FREY: Well, that's what the Court said
- 7 in BMW in effect, that the jury could consider even out
- 8 of state conduct insofar as it revealed something about
- 9 the blameworthiness of the defendant's conduct, the
- 10 defendant's state of mind, the defendant's intentions.
- 11 We're not saying that these things can't be considered
- 12 for that person. What we are saying is that other
- 13 people can bring their own lawsuits and punishment in
- 14 those lawsuits -- If \$75.9 million is right for Jesse
- 15 Williams --
- 16 JUSTICE STEVENS: Isn't the time to
- 17 determine what to do with the second lawsuit is when the
- 18 lawsuit is brought?
- MR. FREY: No, because the problem is ae
- 20 problem with the design. If you punish in the beginning
- 21 -- if you have A, B, C, and D who are potentially
- 22 injured and you punish in A's case for the harm to B, C,
- 23 and D and then the defendant --
- JUSTICE STEVENS: But can't I punish for the
- 25 risk of harm to A, B, C, and D?

1 MR. FREY: Well, if you're punishing for the 2 risk of harm then the same punishment would be 3 appropriate in B's case and C's case and D's case. 4 JUSTICE GINSBURG: But part of this award, 5 at least according to the trial -- there's a footnote 6 referring to an Oregon statute that provides for the 7 distribution of punitive damages between prevailing 8 parties and the State of Oregon. Is -- was this award 9 shared? 10 MR. FREY: Well, it hasn't been paid yet. JUSTICE GINSBURG: But would it be? 11 MR. FREY: I think it would be subject to 12 13 that statute. Now, there's a question whether under the 14 master settlement agreement it would have to be paid 15 back to the companies. But that's a separate question 16 that's not before the court. But our position --17 JUSTICE GINSBURG: But if the state law 18 provides that part of the recovery goes to the state, 19 then at least as to the part that goes to the state you 20 can say, well the state has recovered and you can't --21 MR. FREY: But we have no protection for 22 that. We have no protection. First of all, this 23 verdict --24 JUSTICE GINSBURG: But then you can object 25 in the next case if you're subjected to --

1 MR. FREY: And if we win the next case and 2 we win the case after that and we win the case after 3 that, when do we get credit? 4 JUSTICE GINSBURG: No, I mean when you lose 5 the case on the merits and there's a determination of 6 damages, Oregon says, we adjust for having a prior 7 award. We don't know what that adjustment will be. MR. FREY: Right, but the regime is flawed 8 in its structure because it's a ratchet to get up to the 9 10 highest possible level even though juries who understood 11 the underlying constitutional principle might award 12 less. 13 So I'd like to save, if I may, the balance 14 of my time for rebuttal. 15 CHIEF JUSTICE ROBERTS: Thank you, Mr. Frey. 16 Mr. Peck. 17 ORAL ARGUMENT OF ROBERT S. PECK, 18 ON BEHALF OF THE RESPONDENT MR. PECK: Mr. Chief Justice, and may it 19 20 please the Court: I'll start with the proposed instruction because that is where Philip Morris began 21 22 and the Oregon courts properly treated that as an 23 enigma. It told the jury, it would have told the jury, 24 both that they could consider the extent of harm and not 25 consider the extent of harm with respect to a reasonable

- 1 relationship. That's the disparity guide post.
- 2 Clearly, that is not what this Court has said. And
- 3 what, it's not what the Oregon Supreme Court did. It's
- 4 also significant if you look at the actual proposed
- 5 instruction, which is, starts on page 240, 279(a) of the
- 6 joint appendix, the, the proposed instruction says you
- 7 may consider whether the imposition of punitive damages
- 8 is necessary to punish and deter similar misconduct by
- 9 defendant and others in the future. Now, that's part of
- 10 a calculation that considers harm to others in the
- 11 future as a potential harm. So that is one of the
- 12 things that the Oregon Supreme Court discussed when it
- 13 says that this does not reflect our law.
- 14 It's also significant that they said that
- 15 you could consider financial condition and you cannot
- 16 consider financial condition which is part of the Oregon
- 17 statute. Now Philip Morris in their reply brief says
- 18 that we have conflated an alternative instruction with
- one that they authored but if you look at page 280(a) --
- 20 CHIEF JUSTICE ROBERTS: You're losing me,
- 21 Counsel. What, what specifically is wrong with the
- 22 instruction proposed here?
- MR. PECK: This instruction --
- JUSTICE SCALIA: As briefly as possible,
- 25 one, two, three.

1 MR. PECK: This instruction basically 2 advises the jury to do precisely what Philip Morris 3 argues before this Court it cannot do and that is to 4 take into account the harm suffered by others in 5 determining this disparity. 6 CHIEF JUSTICE ROBERTS: -- you object to in 7 this instruction. I mean, and I thought our cases 8 clearly established that you can consider the harm to others in assessing the reprehensible nature of the 9 10 conduct. You don't disagree with that? 11 MR. PECK: We don't disagree with that and 12 that's precisely what the Oregon Supreme Court did. 13 CHIEF JUSTICE ROBERTS: On the other hand, 14 you cannot -- on the other hand you cannot punish the 15 defendant for those harms particularly in a case where 16 the defendant might have defenses available with respect 17 to those others. So I understood what the instruction 18 sought to do is simply try to draw, it's a fine line but 19 the reason it's a fine line is because of our prior 20 cases, and it tried to draw that distinction between 21 assessing reprehensibility and punishing for harm to 22 others. 23 MR. PECK: We submit that it was 24 unsuccessful in conveying properly what this Court has

held and that is sufficient grounds for the Oregon

25

- 1 Supreme Court to uphold the trial court's decision.
- 2 JUSTICE SCALIA: Would it have been a proper
- 3 instruction if the second sentence had read, although we
- 4 consider the extent of harm suffered by others in
- 5 determining what the -- what that reasonable
- 6 relationship is, although you may consider the extent of
- 7 harm suffered by others in determining how heinous the
- 8 crime, the action of the defendant was, and hence what,
- 9 what that reasonable relationship is? If you had just
- 10 added in that additional thought.
- 11 MR. PECK: Justice Scalia, if that --
- 12 JUSTICE SCALIA: It seems to me that's all
- 13 that's left out of it. Now does leaving that out of it
- 14 make it erroneous?
- 15 MR. PECK: Leaving that out made it
- 16 erroneous because it said, not with respect to
- 17 reprehensibility analysis but with respect to reasonable
- 18 relationship. That was erroneous.
- 19 JUSTICE SCALIA: Yes but reprehensibility
- 20 analysis is part of the reasonable relationship. The
- 21 more reprehensible it is the higher the ratio can be,
- 22 according to our cases as I understand it.
- MR. PECK: Let me take a step back because I
- 24 think there is a confusion here over also the word
- 25 punishment. Punitive damages do not punish for harm,

- 1 they punish misconduct. And this is an important
- 2 distinction because harm is a compensatory concept. You
- 3 compensate others for harm and of course you cannot
- 4 compensate others for harm in the course of this case.
- 5 But you can consider the potential risks, the potential
- 6 harm and the future harm if this course of misconduct is
- 7 not is not deterred.
- JUSTICE SCALIA: You're saying this
- 9 instruction was too favorable to you --
- 10 MR. PECK: No, I'm saying --
- 11 JUSTICE SCALIA: -- because it allowed them
- 12 to consider harm.
- MR. PECK: --this instruction -- -
- 14 JUSTICE SCALIA: And you don't think they
- 15 should have been allowed to consider harm, correct?
- MR. PECK: This instruction as the Oregon
- 17 Supreme Court says, you know, doesn't provide the
- 18 clarity that Philip Morris hoped to provide to the jury.
- 19 And it says and they can't see how this summarizes
- 20 Philip Morris' interpretation of Campbell. That's in
- 21 footnote 3 of the court's opinion.
- JUSTICE BREYER: Why, why -- why though?
- 23 I'm having the same problem. As I read the sentence the
- 24 sentence that we have just been quoting it seems to me
- 25 at first blush that it's completely right. You may

- 1 consider the harm, the extent of harm suffered by others
- 2 in determining what the reasonable relationship is. Now
- 3 you have to be sophisticated in this. Don't ask me how
- 4 the jury is, but assuming that they are, that means that
- 5 the more severely awful the conduct, the higher the
- 6 ratio between the damage award and the injury suffered
- 7 by this victim in court. And if it's really bad, you're
- 8 going to maybe have a hundred times this compensation
- 9 instead of only ten times or five times.
- 10 So -- we take it into account, the extent of
- 11 the harm that could be suffered, in deciding what that
- 12 ratio should be. That means it goes to the evilness of
- 13 the conduct. But you are not to punish the defendant
- 14 for the impact of its alleged misconduct on other
- 15 persons who aren't here in court. In other words, what
- 16 you aren't to do is to look at good old Mrs. Smith who
- 17 has really suffered terribly, she happens not to be in
- 18 court, think about her suffering, which is real and
- 19 serious, and then say I'm going to punish this defendant
- 20 because of what he did to her. Which would be a natural
- 21 human reaction, and perhaps admirable, but regardless,
- 22 the law is that that's what you're not supposed to do.
- 23 So reading it as I just read it naturally,
- 24 it seems to describe what our cases have said is the
- 25 law. Why isn't that right? I'm looking for a real

- 1 answer to the question. I'm posing it in a hostile way
- 2 and hope I'll get an answer.
- 3 [Laughter.]
- 4 MR. PECK: Justice Breyer, if the
- 5 instruction had been given the way you have just stated
- 6 it we would have --
- 7 JUSTICE BREYER: I --
- 8 MR. PECK: -- had no problems. But it's not
- 9 how it reads.
- 10 JUSTICE BREYER: Yes.
- 11 MR. PECK: And it's not what it does. It
- 12 starts out saying that reasonable relationship is about
- 13 the harm to Jesse Williams and then it says you may
- 14 consider the harm suffered by others in determining that
- 15 reasonable relationship. Well, how does harm to others
- 16 help you figure out what the relationship to Jesse
- 17 Williams is? It doesn't compute.
- 18 CHIEF JUSTICE ROBERTS: Well, because the
- 19 instructions indicate and juries often do this that
- 20 punitive damages are certain multiple of the
- 21 compensatory damages, and therefore that's what they are
- 22 saying. In determining what that multiple should be you
- 23 consider whether they have harmed others. And this
- 24 instruction would make all the difference to the world
- 25 in items of what lawyers are going to be argued about.

- 1 If you're allowed to punish for harm to others, you say,
- 2 well, there is however many, a thousand other people in
- 3 the plaintiff's position, so a thousand times would be
- 4 perfectly reasonable but you wouldn't say that the
- 5 conduct is a thousand times more reprehensible. There
- 6 is a more, there is a more natural limit on the multiple
- 7 when you get this kind of instruction.
- 8 MR. PECK: But, but juries don't look at
- 9 punitive damages in terms of a multiple. They are not
- 10 asked to multiply anything and they shouldn't be. They
- 11 are looking at the misconduct. They are looking at how
- 12 you deter others from similar misconduct. They are
- 13 looking at profitability here which is a statutory
- 14 requirement to them.
- 15 JUSTICE SCALIA: Counsel, it seems to me the
- 16 point you're making is not the basis on which the
- 17 Supreme Court of Oregon said the instruction was
- 18 properly disallowed. The Supreme Court of Oregon said
- 19 it was properly disallowed because you can take into
- 20 account directly the harm to other people, isn't that
- 21 the case?
- MR. PECK: That is not the case.
- JUSTICE SCALIA: Okay. Why not?
- 24 MR. PECK: As Justice Ginsburg pointed out
- 25 earlier, the citations that they have used in their

- 1 brief are to the characterization of Philip Morris'
- 2 argument. But if you look at 30(a) in the petition, and
- 3 that second paragraph there starts out with "using harm
- 4 to others as part of the ratio may have been correct
- 5 under the plurality opinion in TXO" --- and then you jump
- 6 down to, "however, it no longer appears to be
- 7 permissible if it ever was."
- 8 JUSTICE ALITO: What about footnote 3, okay?
- 9 The last sentence says, if the jury cannot punish for
- 10 the conduct which is harming others, then it is
- 11 difficult to see why it may consider it at all.
- MR. PECK: And that's because of the nature
- 13 of this conduct. This is not conduct that was directed
- 14 at Jesse Williams and he was the sole recipient of what
- 15 Philip Morris did here. This was a massive market
- 16 directed fraud driven by their rational and deliberate
- 17 decisions at the highest levels of the company to
- 18 deceive customers and knowingly endanger their health.
- 19 They knew that this would have a special impact on those
- 20 who are highly addicted, as Jesse Williams was. And so
- 21 this is the misconduct that Oregon is seeking to deter.
- 22 And how is a state, given the considerable flexibility
- 23 that this Court has recognized, going to deter that kind
- 24 of misconduct if instead society's interest has to be
- 25 fractionalized on an individual case-by-case basis

- 1 knowing that the majority of those cases will never take
- 2 place and in fact in Oregon will not?
- JUSTICE BREYER: Because you read it's about
- 4 harm. You say look here is the person doing something
- 5 absolutely awful, I mean really awful. And look at how
- 6 awful it is. It's the kind of thing that would have
- 7 hurt X number of people badly, maybe kill them.
- 8 MR. PECK: Right.
- 9 JUSTICE BREYER: Now I think we all agree
- 10 that that's an appropriate thing to say. And as long as
- 11 you can say that why can't you create serious damages
- 12 for that type of conduct?
- MR. PECK: Well, that is precisely what we
- 14 believe the Oregon Supreme Court did here. When it
- 15 talked about how highly reprehensible this was,
- 16 extraordinary by any measure, it said those concerns
- 17 override ratio by which they meant single digit ratios.
- JUSTICE SOUTER: What do you say, I mean
- 19 Justice Alito asked you a question about the footnote.
- 20 And I, in all candor I think you told us more about the,
- 21 your case than about the footnote, but let me ask you
- 22 basically the same question about what the Oregon
- 23 Supreme Court meant in the passage that runs from the
- 24 bottom of 20(a) up to 21. It says "Philip Morris's
- 25 proposed jury instructions would have prohibited the

- 1 jury from punishing the defendant for the impact of its
- 2 alleged misconduct on other persons even if those other
- 3 persons were Oregonians who were harmed by the same
- 4 conduct that had harmed Williams, and in the same way.
- 5 As we noted that is not correct as an independent matter
- of Oregon law," and so on.
- 7 That is not a totally unambiguous statement.
- 8 I will concede that, but isn't the most obvious
- 9 reasoning, reading of that a reading that says you can
- 10 punish for harm to others, so long as those others are
- 11 Oregonians and not people in other states?
- 12 MR. PECK: I believe, Justice Souter that
- 13 what the court was doing there which is somewhat similar
- 14 to the analysis below in the Oregon Court of Appeals,
- 15 was to talk about the prospective future victims of this
- 16 fraud, that if it were not deterred which is a
- 17 consideration that the Oregon statute makes clear, if it
- 18 was not deterred then this kind of consideration for the
- 19 same act having the same effect on others then doesn't
- 20 allow you to make sure that on that scale that this is
- 21 at the high end of what we are --
- Justice SOUTER: That's a, that's a, I will
- 23 assume that's a legitimate reading in your favor. But
- 24 the answer, I mean, I think the response has to be after
- 25 listening to you, I don't know. I don't know whether

- 1 that's what they really had in mind here. And if, if I
- 2 really can't figure out what they had in mind, and if I
- 3 go back to the footnote that Justice Alito mentioned
- 4 before, isn't perhaps the better, the better course to
- 5 send this back to them and say, We don't know what you
- 6 mean. Were you saying you can punish for these others
- 7 as distinct from considering risk to others for, on
- 8 reprehensibility?" And let them tell us clearly. Isn't
- 9 that the better course?
- 10 MR. PECK: Well, you know, perhaps that's
- 11 one way to determine what the court meant. But I would
- 12 suggest --
- 13 CHIEF JUSTICE ROBERTS: One way to look at
- 14 what it meant is what you argued below, I'm looking at
- 15 the joint appendix page 199(a), the plaintiff's counsel
- 16 in Oregon to the jury: "How many people do you see
- 17 outside driving home smoking cigarettes?" Now, that
- 18 type of argument is perfectly appropriate to assess
- 19 reprehensibility. On the other hand, with the
- 20 instruction that was offered the defense counsel could
- 21 have warned the jury keep in mind you can't punish for
- 22 those other people. We only have one plaintiff before
- 23 us and we are assessing the reprehensibility with
- 24 respect to that plaintiff. But without the instruction
- 25 you're allowed to argue how many people do you see in

- 1 Oregon smoking cigarettes?
- 2 MR. PECK: Let me suggest that both the
- 3 Oregon Supreme Court and the instructions that were
- 4 actually given to the jury helped answer this by looking
- 5 at the statutory criteria. Oregon has taken
- 6 extraordinary steps since this Court's decision in Oberg
- 7 to enact a statute that guides the courts on the, guides
- 8 the juries and the courts in the assessment of punitive
- 9 damages.
- 10 You know, first there is a threshold.
- 11 Before you can even plead punitive damages you must meet
- 12 that threshold and you must demonstrate to the court by
- 13 admissible evidence that there was a reckless and
- 14 outrageous indifference to a highly unreasonable risk of
- 15 harm, that they've acted with a conscious indifference
- 16 to the health and safety and welfare of others. Now,
- 17 this is part of what infuses it with public purpose.
- 18 Then --
- 19 JUSTICE GINSBURG: May I just ask you what
- 20 is the division? How much of this --
- MR. PECK: 60 percent of an award by statute
- 22 goes to a crime victims fund of the State of Oregon and
- 23 as soon as the judgment is rendered then the state
- 24 becomes a judgment creditor.
- 25 CHIEF JUSTICE ROBERTS: That has no

- 1 relevance to the question of the extent to which the
- 2 defendant is being punished, does it?
- 3 MR. PECK: No, but the statutory criteria
- 4 which requires that the jury find by clear and
- 5 convincing evidence the following factors, which was
- 6 given to this jury in the fashion that I'm about to tell
- 7 you, constrains this award and I think properly makes it
- 8 reasonable.
- 9 First, you have to consider whether there is
- 10 a likelihood that serious harm would arise from the
- 11 defendant's misconduct. Second, the degree of the
- 12 defendant's awareness of that likelihood. Three,
- 13 profitability in the State of Oregon. Four, duration of
- 14 the misconduct and concealment of it. Five, the
- 15 attitude and the conduct of the defendant upon discovery
- of the misconduct. And then finally, financial
- 17 condition of the defendant, which cuts both ways. It
- 18 protects a defendant from being bankrupted by punitive
- 19 damages while at the same time assures that punitive
- 20 damages are enough to have that deterrent effect.
- Now even after that, the defendant could opt
- 22 to have the jury address whether they had been
- 23 previously punished for this misconduct or choose not
- 24 to, which you would expect most defendants to choose,
- 25 and instead post verdict, present that to the trial

- 1 judge.
- 2 JUSTICE BREYER: The trouble with the more
- 3 basic question, I don't know if you can answer it, but
- 4 it is a problem, that when I -- most states have factors
- 5 like that, or many do. Alabama did. You know, not
- 6 quite as good as that, and we saw the patent fraud, you
- 7 know. And there are other cases that would bring up
- 8 products liability. And it's pretty hard to think of a
- 9 products liability case where the jury found negligence,
- 10 where they might not also find these factors. Because
- in a typical case, you'll get competing memos within the
- 12 company. Somebody will have been hurt and likely
- 13 seriously, and when you start thinking about the victim
- 14 in front of you, it all looks pretty bad, and it often
- 15 is, at least in this instance. And now you read these
- 16 five factors, and the difficulty for me has always been,
- 17 well, you read the jury factors like that and they can
- 18 do almost anything. And it's that, it's that fact that
- 19 anything goes that I found disturbing.
- 20 MR. PECK: But this last factor that I was
- 21 about to get to, which I think provides a constraint
- that's unlike the ones that you've seen in other cases,
- 23 and that is the total deterrent effect of other
- 24 punishment imposed in any remedial measures the
- 25 defendant has taken. Now this can be presented first to

- 1 the trial judge, saying okay, we have this huge award,
- 2 but, you know, we have been fined by the government, we
- 3 have had punitive damages assessed against us in other
- 4 cases, and as a result we have taken the following
- 5 measures which assure that we will not engage in this
- 6 kind of misconduct again, and as a result also, this
- 7 award should be cut.
- 8 JUSTICE STEVENS: Do you say that after the
- 9 fact? The jury doesn't hear this?
- 10 MR. PECK: The jury does not. You have the
- option to present it to the jury but you do not have to
- 12 present it to the jury. You can present it first to the
- 13 trial judge and you can also present it at the appellate
- 14 level.
- 15 JUSTICE STEVENS: It seems very odd that a
- 16 major argument for constraint is something that the jury
- 17 can't hear. It just goes to show, really, the
- 18 irrational nature of the exercise.
- 19 MR. PECK: I would suggest it's not
- 20 irrational because what you do is, you've given the
- 21 defendant the option as a strategic matter either to
- 22 present it to the jury or if they thing that will
- 23 guarantee an award of punitive damages against them,
- 24 they can withhold it and put it only to the trial judge.
- 25 This is a protection to the defendant rather than, you

- 1 know, an oddity, I think.
- JUSTICE STEVENS: May I ask this question?
- 3 Assuming there's a distinction, and the instruction
- 4 does, between taking into account the extent of harm to
- 5 others on the one hand and punishing for the extent of
- 6 harm on the other. As I understand what you recited
- 7 about the five parts of the instructions, none of them
- 8 really authorized punishment for harm to others.
- 9 MR. PECK: That is correct, and --
- 10 JUSTICE STEVENS: And is it also true that
- 11 the part the Chief Justice quoted from 199(a), it seems
- 12 to me that could be an argument that you should take
- into account the extent of harm to others, it doesn't
- 14 have to be an argument that you can punish on. And the
- 15 question I want to ask, are there other parts of the
- 16 closing argument in which plaintiff's counsel argued
- 17 that you should take into account, that you should
- 18 punish for harm to others?
- 19 MR. PECK: There is not. The only argument
- 20 that was made in closing was that you can think about
- 21 the others, which was clearly intended to go towards
- 22 that reprehensibility analysis. You know, certainly in
- 23 the criminal law context, an attempted crime is punished
- 24 as badly as an actual crime when all the elements that
- are required to, to accomplish that crime have occurred.

- 1 And in the context of this very unusual long in duration
- 2 misconduct, what you had to do was you had to look at
- 3 that broad attempt to effect Oregon --
- 4 JUSTICE ALITO: Do you think juries can,
- 5 Oregon juries or juries anywhere can understand what
- 6 they are told if they are told, you can take into
- 7 account conduct directed at other people for the purpose
- 8 of assessing how reprehensible the conduct is, but you
- 9 can't punish for the harm that is caused other people?
- 10 MR. PECK: I believe they can. This -- this
- 11 jury did a very good job. First of all, if they --
- 12 JUSTICE ALITO: They can understand that
- 13 distinction and --
- MR. PECK: I believe they can.
- 15 JUSTICE ALITO: And you would have them
- 16 apply that principle in this case?
- 17 MR. PECK: They understood contributory or
- 18 comparative negligence, and gave no award on the basis
- 19 of negligence. They made a distinction in, in the fraud
- 20 claim by only awarding a little bit more than \$21,000,
- 21 even though the request was much higher.
- 22 CHIEF JUSTICE ROBERTS: Well, if they can
- 23 understand that distinction, why wasn't the defense
- 24 counsel entitled to argue to the jury just as you
- 25 argued, you can consider the harm to others in assessing

- 1 reprehensibility, why couldn't the defense counsel say,
- 2 but, you can't punish for the harm to others, if as you
- 3 answered to Justice Alito, a jury can understand that
- 4 distinction?
- 5 MR. PECK: I believe the defense counsel
- 6 would have been entitled to make such an argument. I
- 7 don't think there would have been any need for
- 8 corrective instruction. But what they proposed, which
- 9 was conflicting in two different respects, just did not
- 10 meet the muster.
- 11 CHIEF JUSTICE ROBERTS: So you think it
- 12 would have been, putting aside what they proposed, if
- 13 they had proposed an instruction that said, you may
- 14 consider the harm to others in assessing how
- 15 reprehensible the conduct is but you may not punish
- 16 Philip Morris for the harm to others, you would have had
- 17 no objection to that instruction?
- 18 MR. PECK: I would have had no objection.
- 19 JUSTICE SCALIA: So your only objection is
- 20 that they left out the reason why it is relevant to
- 21 determining what the ratio should be? They just didn't
- 22 say you can consider it in connection with
- 23 reprehensibility. Why is that crucial?
- 24 MR. PECK: I think it was critical and of
- 25 course, you know, Oregon is entitled to run its court

- 1 system as it has for more than 30 years.
- 2 JUSTICE SCALIA: But why was it critical?
- JUSTICE BREYER: Why was it critical?
- 4 MR. PECK: Why was it corrected?
- 5 JUSTICE SOUTER: Yeah. Justice Scalia said,
- 6 you know, they left out this one little bit. Why was
- 7 that critical? What's the answer.
- MR. PECK: Well, the answer is because,
- 9 again, it was not directed for the specific purpose for
- 10 which harm to others may be considered, and that's in
- 11 the reprehensibility analysis. There is no disagreement
- 12 between the parties on that.
- JUSTICE SOUTER: You're saying, I think
- 14 you're saying the jury couldn't have figured that out
- 15 without somebody telling them?
- 16 MR. PECK: But what this instruction told
- 17 him --
- JUSTICE SOUTER: Isn't that what you're
- 19 saying?
- MR. PECK: No, I'm not saying that. What
- 21 the instruction told them is to consider it with respect
- 22 to the reasonable relationship. That means the ratio.
- 23 That means proportionality. And that would suggest, as
- 24 Justice Stevens suggested, that they might multiply it
- 25 by how many people are out there, because I think this

- 1 instruction was an enigma and was confusing.
- 2 JUSTICE SCALIA: Too favorable to you. Too
- 3 favorable to you again, right?
- 4 (Laughter.)
- 5 MR. PECK: You know, perhaps so. But you
- 6 know, the fact of the matter is that, you know, we did
- 7 not advocate that the jury punish for harm to others.
- 8 We do not believe the Oregon court upheld this judgment
- 9 for that reason.
- 10 If I can go on to the, some of the other
- 11 points that are made by Philip Morris. They talk about
- 12 this Court's decision in State Farm as if it were
- 13 nothing more than a ratio, so they reduce the decision
- 14 to ratio. They transform the most important indicium,
- 15 reprehensibility, into a subsidiary role in the ratio
- 16 analysis.
- 17 CHIEF JUSTICE ROBERTS: Can I make, just to
- 18 get the ground rules here, you're not asking us to
- 19 reconsider either State Farm, BMW, any of our punitive
- 20 damages precedents?
- MR. PECK: No, we are not asking you to do
- 22 that. We think that this, this judgment is valid under
- 23 those precedents. They denigrate the state's interest
- 24 which this Court has said is the first consideration,
- 25 the state's interest in deterrence through this

- 1 fractionalized sort of passenger on each individual
- 2 lawsuit, even though the state's interest here when we
- 3 get to the punitive damages phase, it's infused with
- 4 public purpose, that state interest is in deterring
- 5 misconduct, not in figuring out how many dollars might
- 6 be additionally awarded to the plaintiff or even into
- 7 its crime victims fund. It removes the state's
- 8 flexibility and ability to experiment with different
- 9 ways to address the concerns that this Court has stated
- 10 with respect to punitive damages.
- 11 JUSTICE GINSBURG: It depends when you say
- 12 something about duplicative recoveries, because that
- 13 seems to be a major concern.
- 14 MR. PECK: This total deterrent effect
- 15 requirement is the key here, that this is a part of a
- 16 state statute that says that to the extent that there
- 17 had been prior punitive damage awards that have operated
- 18 to affect that deterrence that the state is interested
- in, to the effect that there have been other
- 20 punishments, to the effect that there had been remedial
- 21 measures taken to prevent such misconduct again in the
- 22 future, then the judge is to reduce this award. The
- Oregon Supreme Court has said that this fully addresses
- 24 the concern with multiple awards, duplicative awards,
- 25 and that authoritative construction by that court

- 1 should, should weigh heavily with this Court. But at
- 2 the same time, the fact of the matter is --
- JUSTICE SCALIA: But what if -- your friend
- 4 says, what if we never get assessed for any other case?
- 5 Where do we make up this money?
- 6 MR. PECK: Well, you know --
- 7 JUSTICE SCALIA: Suppose they win every
- 8 other case in Oregon.
- 9 MR. PECK: Well, as a practical matter, they
- 10 have been, they have lost both, the only two cases that
- 11 have gone to a trial in Oregon. And as a practical
- 12 matter, the statute of ultimate repose practically
- 13 prevents any future Oregon plaintiff from bringing such
- 14 a lawsuit. They would have to show that they contracted
- 15 cancer or a disease from smoking within the repose
- 16 period, which is eight years, if one were filed
- 17 tomorrow, eight years ago, and that indeed that the
- 18 fraud was a substantial factor in contracting that
- 19 disease. That is what we were put to prove in this
- 20 case, the relevant date being 1988.
- Now imagine, that window is rapidly closing
- 22 on eight years, because it was after this case that
- 23 Philip Morris decided that they were no longer going to
- 24 deny that smoking causes cancer and they were no longer
- 25 going to deny that nicotine was addictive. So that

- 1 window is rapidly closing, and it's highly unlikely that
- 2 a smoker can point to eight years ago as the point at
- 3 which their cancer basically became active. So as a
- 4 practical matter, there is going to be no awards, future
- 5 awards in Oregon. And as a legal matter, doctrinal
- 6 matter, I believe that Oregon has taken the step
- 7 necessary to prevent multiple awards.
- 8 You know, six states do not permit punitive
- 9 damages in most instances. Another 20 or so cap
- 10 punitive damages. And then 12, of which Oregon is one,
- 11 has chosen a method like this to address that
- 12 duplicative award approach. I think that kind of
- 13 experimentation which is done in good faith, which has
- 14 been authoritatively construed by the courts to address
- 15 this question, is sufficient so address any concerns
- 16 with due process.
- But let's, let's remember also, that while
- 18 the Constitution contains many places where numbers are
- 19 important, the President must be 35 years of age, it has
- 20 implied in other places numbers, like in one person, one
- 21 vote. But the due process clause in its spaciousness
- 22 and majesty doesn't talk about numbers, and that is
- 23 where the concern is only about reasonableness. It's
- 24 about fairness. And here the Oregon legislature,
- 25 supplemented by the Oregon courts, have taken those

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- 2 Since the decision in Oberg, there have been
- 3 only 14 punitive damage decisions in Oregon. Four of
- 4 them have been overturned entirely by the Oregon Supreme
- 5 Court, so no punitive damages awarded. There are only
- 6 two out of all those awards that exceed single digits,
- 7 and this is one of them. So I think that the courts
- 8 have done a good job there of trying to address these
- 9 concerns.
- 10 And one of the areas of agreement between
- 11 our opponents and us is that the state wrote in their
- 12 brief that, reprehensibility ensures that the greater
- 13 wrong receives the greater punishment. But the regime
- 14 that they are suggesting, one that has a categorical
- 15 ratio limit and atomizes this kind of consideration so
- 16 you don't look at the broader societal and public
- 17 purpose, that one guarantees a regime of
- 18 underdeterrence. And Oregon has, as it is their right,
- 19 opted for optimal deterrent effect. Thank you.
- 20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Peck.
- 21 Mr. Frey, you have four minutes remaining.
- 22 REBUTTAL ARGUMENT OF ANDREW L. FREY
- ON BEHALF OF PETITIONER
- MR. FREY: Thank you, Mr. Chief Justice.
- 25 Let me, let me start with, let me start with the

- 1 observation that Mr. Peck has argued as though this was
- 2 a class action, as though total deterrence,
- 3 disgorgement, and all these things were all to be
- 4 achieved in this case, which is the heart of our problem
- 5 here with the denial of the instruction. He referred to
- 6 this other case in Oregon, which is the Schwarz case, as
- 7 finding liability also, but what he didn't mention was
- 8 that on the issue of the fraud relating, involving the
- 9 relationship between cancer, between smoking and health,
- 10 the jury found for the defendant. They found liability
- 11 on a different issue, but not on this issue. So it
- 12 hardly proves that we would lose all cases. It's also
- 13 true that in that case, where the jury did not
- 14 receive -- we asked for but we didn't get an instruction
- 15 like this -- the jury actually came back and said: Does
- 16 our award have to be reasonably related to the injury to
- 17 Mrs. Schwarz? And the judge refused to tell them the
- 18 answer to that. So juries do understand this problem
- 19 and they do think about this problem.
- The suggestion was made that you can
- 21 present prior awards to the trial judge. Now, I, I hope
- 22 during my opening argument I covered the reasons why
- 23 there's a structural deficiency in the system if the
- 24 system even called for getting credit, which the
- 25 statutes don't require. But you should know that the

- 1 Oregon plaintiffs' lawyers have argued that under the
- 2 Oregon constitution it must be presented to the jury or
- 3 is it may not be considered by the court. So while here
- 4 he wants to assure you that it can be presented to the
- 5 court, that's not the position they are taking below.
- On the question by Justice Souter about
- 7 whether you should send it back and what the Oregon
- 8 Supreme Court meant by its discussion, if it's in your
- 9 ruling what we say it meant they should have reversed
- 10 and said were entitled to the instruction or identified
- 11 some other type, some other reason why we're not
- 12 entitled to the instruction. Now, there may be some
- independent state ground that you're not aware of, but
- 14 you ought to say at a minimum that they were wrong and
- 15 that a defendant in a punitive damages case is entitled
- 16 to an instruction of this general nature, and then we
- 17 can let the Oregon courts on remand address whether
- 18 there is some other problem which we frankly don't see,
- 19 but that would be for them.
- Now, if Mr. Peck is right about the
- 21 nature of the conduct, there should be plenty of
- 22 lawsuits and plenty of liability. If there isn't, the
- 23 Court can't speculate that we ought to punish Philip
- 24 Morris more in this case because other people are not
- 25 sufficiently aggrieved to sue. That seems to me totally

- 1 impermissible speculation.
- 2 On the question of harm versus conduct,
- 3 the unit of prosecution is the cause of action, so that
- 4 it's not, it's not, you can repeatedly -- in our, in our
- 5 submission you can repeatedly punish a defendant for the
- 6 same conduct, for the impact of the same conduct causing
- 7 injury to different people. What we are basically
- 8 saying is that there are, there are potentially many
- 9 causes of action out there for this conduct and the
- 10 punishment in this case should be limited to the cause
- 11 of action that is being tried before the jury in this
- 12 case.
- 13 Let's see if I -- if I have anything
- 14 else. Justice Stevens talked about the ambiguity of the
- 15 closing argument and I agree it's not clear what
- 16 plaintiff's counsel was exactly saying. It be
- interpreted in different ways. But that is a reason to
- 18 have a cautionary instruction, not a reason to forgo
- 19 one, to make sure the jury understands the applicable
- 20 principles.
- Thank you.
- 22 CHIEF JUSTICE ROBERTS: Thank you, Mr. Frey.
- The case is submitted.
- (Whereupon, at 11:04 a.m., the case in the
- 25 above-entitled matter was submitted.)

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